



Ravi Venkataraman <rvenkataraman@richmondvt.gov>

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## Formula Businesses

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David W. Rugh <drugh@firmspf.com>

Tue, Nov 15, 2022 at 5:25 PM

To: Ravi Venkataraman <rvenkataraman@richmondvt.gov>

Hi Ravi,

I'm just diving into this review, and it became immediately apparent that these proposed regulations are problematic, regardless of the version. While it's nice to include a purpose statement like what the Chair proposes so it's clear why the regulation is implemented, the way the Planning Commission proposes to address these types of businesses appears unlawful. The larger issue with these regulations is that they purport to regulate based on the identity of the business, not the proposed land use. While imposing certain footprint or size restrictions on uses, as well as dictating architectural and sign standards, are generally acceptable for commercial uses like this, characterizing a use based on the identity of the owner or operator is prohibited. *See, e.g., Vermont Baptist Convention v. Burlington Zoning Bd.*, 159 Vt. 28, 30-31, 613 A.2d 710, 711 (1992) (“[a] distinction based upon the identity of the owner rather than the public health, safety, morals, or general welfare would be invalid”).

The definition of “formula business” is obviously based on the identity of the business owner because it treats these businesses/uses differently solely because they share characteristics with other establishments. While the proposed regulation looks in one way to the use of land since the establishment has to be retail or restaurant, the remainder of the definition of “formula business” requires the DRB or Zoning Administrator to look directly to the owner’s identity to appropriately classify the use. This type of zoning regulation is not lawful and is likely to be overturned if challenged. We are not aware of another municipality in Vermont, other than perhaps Wilmington, that has adopted zoning bylaws that regulate formula businesses, and we think the absence of such regulations supports our opinion that what the Planning Commission proposes is unlikely to withstand a court challenge.

Instead of focusing on the operator of the business and whether it has multiple locations or is similar to other businesses, we recommend the Planning Commission focus on enacting strict architectural and dimensional standards on uses in its Village Downtown, Village Commercial and Residential Commercial Districts (and perhaps a few others) in order to protect the unique visual character of these areas. A total size/area cap on retail and other related commercial structures is completely acceptable and has been routinely upheld. Also, while it's unlikely that a regulation requiring alteration of logos on signage will be upheld against a constitutional challenge or a challenge under the Lanham Act (corporate logos protected by trademark), municipalities can may be able to enact a blanket prohibition on display of logos, which is risky, or more appropriately, regulate how those logo appear by prohibiting, for example, internal illumination or signs with an area larger than 9 square feet.

I'm around the office and generally free tomorrow if you'd like to chat.

Thanks,

Dave

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**From:** Ravi Venkataraman <[rvenkataraman@richmondvt.gov](mailto:rvenkataraman@richmondvt.gov)>

**Sent:** Saturday, November 12, 2022 9:20 AM

**To:** David W. Rugh <[drugh@firmspf.com](mailto:drugh@firmspf.com)>

**Subject:** Formula Businesses

Dave,

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## Formula Businesses

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David W. Rugh <drugh@firmspf.com>

Wed, Nov 16, 2022 at 10:09 AM

To: Ravi Venkataraman <rvenkataraman@richmondvt.gov>

Hi Ravi,

I anticipate questions from the Planning Commission and Selectboard, along the lines of: How can other communities enact zoning regulations and ordinances like this but Richmond can't? The key distinction is due to the nature of municipal authority in Vermont, which is a so-called "Dillon's Rule" state, and the fact that these other jurisdictions are so-called "home rule" states. In "home rule" states, the state constitution grants municipalities or counties the ability to pass laws to govern themselves as they see fit, so long as they obey the state and federal constitutions. On the other hand, Dillon's Rule means municipalities have "only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." *City of Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441 (quoting *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977)). Functionally, Dillon's Rule operates as a canon of construction requiring that grants of power to municipalities be "unambiguous" and interpreted strictly. *Id.* at ¶¶ 20-21. Thus, Vermont municipalities can only act or regulate if they've been delegated the power by the Legislature, and without enabling authority under either 24 V.S.A. Chapter 117 for zoning bylaws or 24 V.S.A. Chapter 61 (and a few others) for general ordinances, municipalities are not allowed to exert control.

The "dollar store ordinances" that ILSR advocates for appear to be general or stand-alone ordinances, so for those to be enacted in Vermont, the Legislature would have to provide explicit authorization in 24 V.S.A. § 2291 to authorize municipalities to regulate the placement and operation of retailers. Other than authorizing municipalities to regulate itinerant vendors, peddlers or door-to-door salespeople, 24 V.S.A. § 2291(9), there does not appear to be general ordinance authority to regulate retailers outside of zoning bylaws.

24 V.S.A. Chapter 117 authorizes communities to adopt zoning regulations to control "land development," which essentially looks to the subdivision or use of land or the use of structures. Chapter 117 does not provide authority to a municipality to look at the identity of the individual or property owner who is going to conduct the use. As a result, any regulation that focuses on the operator or owner of the use, including regulations that attempt to control use based on the owner or operator's ownership of or similarity to other businesses, likely exceeds the enabling authority of Chapter 117, which requires municipalities to focus on the use of land or a structure, not its owner or the identity of the operator.

One option that might be workable, instead of focusing on formula businesses and their identity, is to refine the Zoning Regulations' definition of retail uses so as to create a "small box variety store" use. Proceeding in this fashion is similar to what Kansas City did and is more permissible because the definition of the use focuses on the types of products sold and size of business, instead of the identity of the owner. This will likely require a whole-sale re-evaluation of the different retail uses allowed under the Zoning Regulations and may require creating additional retail uses to describe different types of retail stores. However, a provision that limits the number of "small box variety store" uses in a district or that includes a radius restriction is more likely to withstand a challenge than the proposed "formula business" regulations. Enacting a "small box variety store" use and combining that with strict architectural, aesthetic and dimensional requirements to control the appearance of those uses will probably be just as effective as the proposed "formula business" regulations and is more likely to be upheld because it focuses on the use of land.

If there are further questions, please let me know, but hopefully the foregoing gives the Planning Commission a way forward.

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